REDACTED—FOR PUBLIC INSPECTION

HWG | HARRIS, WILTSHIRE & GRANNIS LLP

December 20, 2016

VIA HAND-FILING AND ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Request for Confidential Treatment Pursuant to 47 C.F.R. §§ 0.457 and 0.459

Dear Ms. Dortch:

KDDI America, Inc., KDDI Global LLC, Locus Telecommunications, LLC, Telehouse International Corporation of America, and Total Call International, LLC ("Parties"), through counsel, hereby file this Request for Review of a Decision of the Universal Service Administrator. The Parties are filing a confidential and publicly available version of this letter and attached Request for Review.

The Parties respectfully request that, pursuant to 47 C.F.R. §§ 0.457 and 0.459, the Commission withhold from any future public inspection and accord confidential treatment to the sensitive business information they are providing—all of which has been redacted from the publicly available version of the attached comments. The redacted information constitutes sensitive commercial information that falls within Exemption 4 of the Freedom of Information Act ("FOIA"). Exemption 4 of FOIA provides that the public disclosure requirement of the statute "does not apply to matters that are ... (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential."[1] Because these comments include commercial information "of a kind that would not customarily be released to the public," this information is "confidential" under Exemption 4 of FOIA.[2] In addition, the Parties would suffer substantial competitive harm if this information were disclosed.[3] Accordingly, the enclosed appeal is marked with the header "CONFIDENTIAL TREATMENT REQUESTED PURSUANT TO 47 C.F.R. §§ 0.457, 0.459 – NOT FOR PUBLIC INSPECTION."

In support of this request and pursuant to Section 0.459(b) of the Commission's rules, the Parties hereby state as follows:

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1 5 U.S.C. § 552(b)(4).

2 *Critical Mass Energy Project* v. *NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

3 *See Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

1. Identification of the Specific Information for Which Confidential Treatment Is Sought (Section 0.459(b)(1))

The Parties seek confidential treatment for their appeals to USAC, USAC's decision on those appeals, and correspondence with USAC related to the appeals and underlying audits.

2. Description of the Circumstances Giving Rise to the Submission (Section 0.459(b)(2))

In September 2013, USAC initiated audits of each Party. On October 28, 2015, USAC released its Final Audit Report for each Party and a consolidated liability analysis of the Parties as a whole. On October 21, 2016, USAC released its decision on the Parties' appeal of the Final Audit Reports. The Parties are requesting review of USAC's appeal decision pursuant to 47 C.F.R. § 54.719(c).

3. Explanation of the Degree to Which the Information Is Commercial or Financial, or Contains a Trade Secret or Is Privileged (Section 0.459(b)(3))

The information described above is protected from disclosure because it constitutes highly sensitive information. USAC's Final Audit Reports, appeal decision, and this Request for Review contain information about the Parties' finances and strategic decisions, which constitute sensitive commercial information "which would customarily be guarded from competitors."[4]

"A commercial or financial matter is 'confidential' for purposes of [FOIA exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[5] The findings in USAC's Final Audit Reports and appeal decision reveal information about the Parties' commercial arrangements, billing, marketing, and distribution practices, and financial health. Such information is confidential commercial information related to the Parties' ongoing operations. Improper disclosure of this information would result in substantial competitive harm by giving competitors and customers insights into the Parties' marketing and financial strategies. This would afford the Parties' competitors and customers in unfair advantage in designing their own marketing strategy and negotiating future commercial contracts with the Parties.

4. Explanation of the Degree to Which the Information Concerns a Service that Is Subject to Competition (Section 0.459(b)(4))

The domestic and international telecommunications market is highly competitive.

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4 47 C.F.R. § 0.457.

5 *Nat'l Parks*, 498 F.2d at 770.

5. Explanation of How Disclosure of the Information Could Result in Substantial Competitive Harm (Section 0.459(b)(5))

Disclosure of the information in this Requested for Review, the Final Audit Reports, and the appeal decision would provide the Parties' competitors with sensitive insights related to the Parties' operations, costs, strategic decisions, and financial health—all of which would work to the Parties' severe competitive disadvantage.

6. Identification of Any Measures Taken to Prevent Unauthorized Disclosure (Section 0.459(b)(6)) and Identification of Whether the Information Is Available to the Public and the Extent of Any Previous Disclosure of the Information to Third Parties (Section 0.459(b)(7))

The Parties do not make this information publicly available and previously requested confidential treatment before releasing any information to the USAC audit teams and to USAC management.

7. Justification of Period During Which the Submitting Party Asserts That Material Should Not Be Available for Public Disclosure (Section 0.459(b)(8)).

Due to the extreme sensitivity of the information provided, the Parties request that the materials identified as confidential be withheld from public disclosure indefinitely. Release of this information at any time would cause substantial competitive harm to the Parties for the foreseeable future. Therefore, the request for ongoing confidential treatment is reasonable.

Should you have any questions regarding the foregoing, please contact the undersigned at (202) 730-1346.

Sincerely,

Brita D. Strandberg

Counsel to KDDI America, Inc., KDDI Global LLC, Locus Telecommunications, LLC, Telehouse International Corporation of America, and Total Call International, LLC

REDACTED—FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In The Matter of Universal Service Contribution Methodology Request for Review of a Decision of the Universal Service Administrator by KDDI America, Inc.; KDDI Global, LLC; Locus Telecommunications, LLC; Telehouse International Corporation of America, and Total Call International, LLC	WC Docket No. 06-122

REQUEST FOR REVIEW OF A DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR

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December 20, 2016

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In The Matter of Universal Service Contribution Methodology Request for Review of a Decision of the Universal Service Administrator by KDDI America, Inc.; KDDI Global, LLC; Locus Telecommunications, LLC; Telehouse International Corporation of America, and Total Call International, LLC	WC Docket No. 06-122

REQUEST FOR REVIEW OF A DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR

Pursuant to 47 C.F.R. § 54.719(c), KDDI America, Inc. ("KDDIA"), KDDI Global, LLC ("KDDI Global"), Locus Telecommunications, LLC ("Locus"), Telehouse International Corporation of America, and Total Call International, LLC ("Total Call") (collectively, the "Appellants") seek review by the Wireline Competition Bureau ("Bureau") of audit findings made by the Universal Service Administrative Company ("USAC") in the course of an audit of Appellants' 2013 Forms 499-A.

SUMMARY

This appeal presents two straightforward legal questions for the Bureau. The first is whether USAC may read the term "marketing agent" as used in the Form 499-A instructions to encompass *non-agent* third parties. Because the definition of the term "agent" is clear in Commission precedent and the common law, and the evidence examined by USAC shows that the third parties to which Locus and Total Call sold prepaid wireless products were not agents,

USAC erred by finding otherwise and requiring Locus and Total Call to contribute to the Fund on the basis of revenues received by these non-agent third parties.

The second question is whether USAC erred when it examined Locus' *customers'* sales, not Locus' sales, when evaluating whether Locus is a private carrier. In the appeal decision, USAC concluded Locus was a common carrier, not a private carrier, with respect to Locus' sales of prepaid calling cards to its wholesale customers. To reach this conclusion, USAC examined the nature of the sales of prepaid calling cards by Locus' wholesale customers to their customers. But the FCC has made it clear that one may not "look to the customers' customers to determine the status of a carrier."[1] Because USAC relied on sales by Locus' customers' customers to determine Locus' status, USAC's determination that Locus is a common carrier with respect to those sales should be reversed. USAC compounded this error by effectively directing Locus to contribute to the TRS and other non-USF funds on the basis of private carriage revenue, including revenue that USAC agrees is private carriage revenue.

Finally, Appellants note that USAC directed KDDI Global and Locus to report revenue as carriers' carrier revenue even in the absence of the required "reasonable expectation" that their customers were, in fact, resellers as the Commission has defined that term. Appellants believe this issue is not ripe for review, however, and the Bureau need only reach Appellants' arguments if it determines that it is necessary to resolve this issue.

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[1] *AT&T Submarine Systems, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21,585, 21,587-88 ¶ 6 (1998) ("*1998 AT&T Submarine Systems Order*"), *aff'd Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999).

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I. BACKGROUND

Appellants are a group of five related companies that provide a wide range of communications and related services. Appellants are affiliates as that term is defined in the Communications Act of 1934 ("the Act"),[2] and, accordingly, disclose a common controlling entity on the Form 499-A.[3] On August 29, 2013, USAC announced that it would conduct audits of all five Appellants' 2013 Form 499-A filings. Appellants cooperated fully with USAC during its lengthy and detailed audit process. On October 28, 2015, USAC issued a Final Audit Report for each Appellant.[4]

On December 16, 2015, Appellants filed a consolidated appeal of those Final Audit Reports with USAC, challenging USAC's findings in five respects.[5] On October 21, 2016,

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2 47 U.S.C. § 153(2).

3 *See* 2013 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A) at 10 ("2013 Form 499-A Instructions").

4 USAC Internal Audit Division Report on the Audit of KDDI America, Inc. – 2013 FCC Form 499-A Rules Compliance (USAC Audit No. CR2013CP016) (July 16, 2015), appended as Attachment A to USAC Appeal, *infra* note 5; USAC Internal Audit Division Report on the Audit of KDDI Global, LLC – 2013 FCC Form 499-A Rules Compliance (USAC Audit No. CR2013CP013) (July 16, 2015) ("KDDI Global Final Audit Report"), appended as Attachment B to USAC Appeal; USAC Internal Audit Division Report on the Audit of Locus Telecommunications, Inc. – 2013 FCC Form 499-A Rules Compliance (USAC Audit No. CR2013CP012) (July 16, 2015) ("Locus Final Audit Report"), appended as Attachment C to USAC Appeal; USAC Internal Audit Division Report on the Audit of Telehouse International Corporation of America – 2013 FCC Form 499-A Rules Compliance (USAC Audit No. CR2013CP015) (July 16, 2015), appended as Attachment D to USAC Appeal; USAC Internal Audit Division Report on the Audit of Total Call International, Inc. – 2013 FCC Form 499-A Rules Compliance (USAC Audit No. CR2013CP014) (July 16, 2015) ("Total Call Final Audit Report"), appended as Attachment E to USAC Appeal.

5 Appeal of Final Audit Reports issued on October 28, 2015 by KDDI America, Inc. (Filer ID 819514), KDDI Global LLC. (Filer ID 826578), Locus Telecommunications, LLC (Filer ID 824334), Telehouse International Corporation of America (Filer ID 828094), and Total Call International, Inc. (Filer ID 821882) (filed Dec. 16, 2015) ("USAC Appeal"), appended as Attachment 1 hereto.

USAC issued its decision addressing the USAC Appeal, reversing two of the five decisions at issue.[6] *First,* USAC agreed that Locus and Total Call had relied on books and records and not made good-faith estimates when reporting the jurisdiction of prepaid calling card revenue.[7] *Second,* USAC agreed that "because the FCC has not addressed the classification of VPN service generally, USAC should have allowed KDDIA to treat this revenue as information service revenue."[8] USAC disagreed with Appellants with respect to the remaining three issues, and Appellants now challenge that decision.

II. QUESTIONS PRESENTED FOR REVIEW

This appeal presents the following questions for the Bureau. *First,* whether USAC erred when it treated resellers of Locus and Total Call's prepaid wireless products as marketing agents where those relationships did not satisfy either the Commission or common law test for a principal-agent relationship. *Second*, whether USAC erred when it examined sales by Locus' customers, rather than by Locus, to determine whether Locus acted as a private carrier, and relatedly, whether USAC erred by requiring Locus to report private carriage revenues in a manner that results in Telecommunications Relay Service ("TRS") charges and other assessments that are not due on private carriage revenue. *Finally,* to the extent that the issue is ripe for review, whether USAC erred by directing KDDI Global and Locus to report certain revenue as carrier's carrier revenue where KDDI Global and Locus did not have the required

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6 Letter from Universal Service Administrative Company to Brita Strandberg, *Administrator's Decision on Contributor Appeal* (Oct. 21, 2016) ("USAC Appeal Decision"), appended as Attachment 2 hereto.

7 *Id.* at 3.

8 *Id.*

"reasonable expectation" that their customers had contributed to the Universal Service Fund ("USF" or "Fund") based on that revenue.

III. ARGUMENT

A. USAC IMPROPERLY CONCLUDED THAT LOCUS AND TOTAL CALL'S RESELLERS ARE MARKETING AGENTS.

During the audit period, Locus and Total Call reported actual prepaid wireless revenue received from their wholesale customers. USAC, however, concluded that Locus and Total Call should have reported all prepaid wireless revenue that those customers collected from *their* customers. To make this finding, USAC equates mobile-phone wholesale customers to "marketing agents," which disregards both FCC and common law standards of agency.

In addition, USAC's broad reading of the Commission's instructions concerning marketing agents appears intended to achieve the same treatment of prepaid wireless revenue that applies to prepaid calling card revenue. In other words, by interpreting the term "marketing agent" to include non-agents, USAC can require providers like Locus and Total Call to report not on the basis of the revenues they receive, but rather on revenues received by their wholesale customers. The Commission adopted this rule for prepaid calling cards, but has never done so for prepaid wireless services. Even if the marketing agent requirement could reasonably be read to encompass *non*-agents, USAC is without authority to adopt this interpretation on its own.[9]

Finally, a rule that requires wholesale prepaid wireless providers to contribute on the same basis as prepaid calling card providers would violate Section 254 of the Act. Section 254 requires that providers contribute to the Fund on an "equitable and nondiscriminatory" basis.[10] The requirement that prepaid wireless providers contribute based on downstream revenues, while

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[9] 47 C.F.R. § 54.702(c).

[10] 47 U.S.C. § 254(b)(4).

other wholesale providers report only revenue received directly from their customers, is inequitable and discriminatory, and thus unlawful.

1. Locus and Total Call's Wholesale Customers are not its Marketing Agents

The Commission's precedents make clear that a third party is not an agent of a carrier when that third party has the right to set the price for the relevant service. Thus, the Commission has explained that "sales agents . . . do not set the terms and prices" for offered services.[11] Here, USAC conceded that Locus and Total Call's wholesale customers could set prices for the services Locus and Total Call sold, acknowledging that they "had an *option* to choose the price charged to end-user customers . . ."[12] Because Locus and Total Call's wholesale customers controlled the price at which they sold products purchased from Locus and Total Call, they cannot have been Locus and Total Call's agents.

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[11] *See Philippine Long Distance Telephone Company, Complainant v. USA Link, LP d/b/a USA Global Link, Defendant*, Memorandum Opinion and Order, 12 FCC Rcd. 12,010, 12,017 ¶¶ 19-20 (1997) (finding party to be reseller in part because it sets the rates for the services it sold); *Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, Order, 3 FCC Rcd. 4604, 4606 ¶ 20 (1988); *Universal Service Contribution Methodology Federal-State Joint Board on Universal Service, Application for Review by American Cyber Corp., Coleman Enterprises, Inc., Inmark, Inc., Lotel, Inc., and Protel Advantage, Inc.*, Order on Reconsideration, 29 FCC Rcd. 7538, 7543-44 ¶ 11 (2014) (finding a party to be a marketing agent in part because it did not set the rates for the services it sold).

[12] USAC Appeal Decision at 6. USAC contends that Locus and Total Call did not provide documentation to demonstrate that their wholesale customers charged amounts that differed from retail prices. Whether or not the customers did so, it is clear they had that power, and thus were not acting as agents for Locus and Total Call. And, in fact, because the wholesale customers acted on their own behalf and with near-complete independence, they had no reason or duty to communicate their pricing decisions to Locus or Total Call. USAC's requirement that Locus and Total Call produce evidence of the pricing practices of their wholesale customers would make sense if those wholesale customers were their agents and subject to their control; because they are not, Locus and Total Call cannot demand the very evidence that USAC appears to believe is necessary to disprove agency.

The common law of agency confirms this. "'Agent' is a word used to describe a person authorized by another to act on his account and under his control."[13] Similarly, "a principal has the right to control the conduct of the agent" and the "extent of the right to control the physical acts of the agent is an important factor in determining whether or not a master-servant relationship between them exists."[14] "There are many relationships in which one acts for the benefit of another which are to be distinguished from agency by the fact that there is no control by the beneficiary."[15]

USAC's interpretation of the Form 499-A instructions would read the word "agent" out of the instructions. Locus and Total Call did not have the control over their wholesale customers that is the hallmark of agency. Their agreements with their wholesale customers transferred title of purchased products from Locus and Total Call to the customers, permitted the customers to set prices for those products, and transferred the risk of loss to those customers.[16] In selling the purchased products, the customers were acting on their own account, and were not under the control of Locus and Total Call.

Even if USAC could ignore the term "agent" in the Form 499-A instructions, Locus and Total Call's wholesale customers would still not be marketing agents because they do not market "on behalf of" Locus and Total Call. Consistent with core concepts of agency, the Form 499-A instructions make clear that marketing agents must "market services *on behalf* of a

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13 Restatement (First) of Agency § 1 cmt. d (Am. Law Inst. 1933).

14 *Id.* § 14 & cmt. a.

15 *Id.* cmt. c.

16 *See* Letter from Brita Strandberg, Counsel to Locus to USAC (November 27, 2013) ("2013 Locus Letter"), appended as Attachment 3 hereto; USAC Appeal at 9-10.

telecommunications provider."[17] To characterize Locus and Total Call's wholesale customers as marketing agents, USAC relied on provisions in the wholesale agreements that require the wholesale customers to "market, promote and distribute" the products they purchase.[18] Such marketing and promotion requirements are common in non-agency agreements like those here. Critically, the agreements do not require marketing "on behalf of" Locus and Total Call.[19] Instead, because the wholesale customers bear the risk of loss, the marketing these customers do is on their own behalf. Because these customers neither serve as agents of Locus and Total Call nor market services on behalf of Locus and Total Call, USAC's conclusion that they are marketing agents is in error.

2. USAC's Finding Strays from the Form 499-A Instructions and Violates Section 254 of the Communications Act.

By applying an overbroad definition of the term "marketing agent," USAC appears to have unilaterally extended the Commission's rule for prepaid calling card providers to prepaid wireless providers. But USAC is not free to interpret the Commission's rules in this way.

As a general matter, the FCC requires providers to report "gross billed revenues."[20] For most services, gross billed revenues are "total revenues billed to customers during the filing period."[21] For prepaid calling card providers, however, gross billed revenues "should represent the amounts actually paid by end user customers and not the amount paid by distributors or

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17 2013 Form 499-A Instructions at 3 (emphasis added).

18 *See* USAC Appeal Decision at 6; Locus Final Audit Report at 17; Total Call Final Audit Report at 18 (citations omitted).

19 *See, e.g.*, Locus Final Audit Report at 15.

20 2013 Form 499-A Instructions at 13.

21 *Id.*

retailers."[22] In other words, the FCC has directed that *prepaid calling card providers* must depart from the general rule that they report revenues received from their wholesale customers, and instead report based on revenues received by those wholesale customers when prepaid calling cards are resold. This is, as we explain below, an inequitable and discriminatory practice that violates Section 254 of the Act. But it is, at least, a requirement that finds support in the Commission's Orders and its Form 499-A instructions.

There is no parallel requirement for prepaid wireless services. Yet USAC has apparently tried to treat prepaid wireless revenue in the same way as prepaid calling card revenue by calling Locus and Total Call's wholesale customers "agents," even though the contracts between Locus and Total Call and their wholesale customers do not establish a principal-agency relationship. USAC may prefer this type of reporting, and it may view prepaid wireless and prepaid calling card services as sufficiently similar that the services should be reported in the same way. Even so, USAC may not on its own decide that providers of prepaid wireless services should contribute in the same way as prepaid calling card providers.[23] That is, however, what USAC has done here, stretching the term "marketing agent" to potentially include any third party that purchases services and then markets those services on its own behalf. Further, it has taken this step even though when the Commission intended this result for prepaid calling card providers it did so expressly. USAC's interpretation of the Form 499-A instructions to require prepaid wireless providers to contribute as if they were prepaid calling card providers is simply beyond its authority, and should be reversed.

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[22] *Id.* at 19.

[23] *See* 47 C.F.R. § 54.702(c) ("The Administrator may not make policy, interpret unclear provisions of the statutes or rules, or interpret the intent of Congress.").

Finally, USAC's finding would require revenue reporting that is not permitted by Section 254 of the Act. That section requires "equitable and nondiscriminatory" contributions to the Fund. But USAC's approach, which would require Locus and Total Call to contribute on the basis of revenues *they do not receive*, is not equitable and nondiscriminatory. To the contrary, by requiring a small subset of providers to contribute on a different, likely inflated, base of revenue, USAC necessarily discriminates against these providers. This inequitable result cannot be squared with the requirements of Section 254.

Further, USAC imputes revenue to Locus and Total Call based on so-called "retail" prices with no evidence that such prices were actually charged or that such revenue was actually received, much less received by Locus or Total Call.[24] Section 254, however, mandates Fund contributions based only on telecommunications revenues that are *actually collected* by providers. Because Section 254 does not permit contributions on revenue that is not received, USAC improperly demanded that Locus and Total Call contribute on the basis of "retail" revenues that may or may not have been received by their wholesale customers.

B. LOCUS SELLS ITS PREPAID CALLING CARDS AS A PRIVATE CARRIER, NOT A COMMON CARRIER.

1. USAC Failed to Examine Locus' Sales to Calling Card Resellers, and Instead Relied on those Resellers' Sales to End Users, to Conclude Locus is a Common Carrier.

It is well settled that "a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal."[25] Locus' sales of prepaid calling cards to wholesale customers were negotiated, arm's length transactions

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[24] USAC Appeal at 8.

[25] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976).

between sophisticated businesses that meet the definition of private carriage.[26] To conclude otherwise USAC examined sales of calling cards to ultimate end users, rather than Locus' sales to its customers.[27] But this is the wrong test. The FCC has explained that one cannot "look to the customers' customers to determine the status of a carrier."[28] USAC could only conclude Locus is a common carrier with respect to its sales of prepaid calling cards by examining Locus' sales of those cards to its customers, which it failed to do. Because Locus individually negotiated *its* sales to *its* customers, it qualifies as a private carrier with respect to its wholesale sales to those customers.[29]

2. USAC Erroneously Included Locus' Non-Calling Card Private Carriage Revenue in its TRS Fund Contribution Base

In its audit, USAC recognized that Locus earned a portion of its revenue from private carriage offerings.[30] USAC thus found that Locus offered certain services on a private carriage basis, and others on a common carriage basis. USAC nevertheless required Locus to report its private carriage revenues in a manner that results in their inclusion in the contribution base for TRS, LNP and NANPA (the "Title II Funds"). USAC's only answer to Locus' objection to this

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26 *See* 2013 Locus Letter; USAC Appeal at 9-10.

27 USAC initially took the position that prepaid calling cards may *only* be sold on a common carriage basis, Locus Final Audit Report at 41-45, but appears to have since abandoned that position. USAC Appeal Decision at 8. For the reasons explained in Appellants' appeal to USAC, this is the correct outcome. USAC Appeal at 9.

28 *1998 AT&T Submarine Systems Order* ¶ 6.

29 USAC cites an Enforcement Bureau finding that Locus is a common carrier as support for its conclusion. *Locus Telecommunications, Inc.*, Forfeiture Order, 30 FCC Rcd. 11,805 (2015). That finding is currently subject to judicial review, *see United States v. Locus Telecommunications, Inc.*, Case No. 2:16-cv-03178-SDW (D.N.J. docket opened June 2, 2016), and Locus plans to vigorously contest the Bureau's determination.

30 *See* Locus Final Audit Report at 41.

directive was to point to failings in the Form 499-A, claiming that the "Form 499-A does not provide a method by which Locus may remove its non-calling card private carriage revenue from its TRS contribution base."[31]

The FCC's rules are clear—private carriage revenues are not subject to TRS and other Title II Fund contributions. USAC should not require contributions that are not required by the Commission's rules, but that is what it has effectively done here.[32] At a minimum, having been alerted to this inconsistency between the Commission's Title II Fund contribution requirements and the Form 499-A, USAC should have sought guidance from the Commission[33] and permitted Locus to document and segregate its non-common carrier revenues so that it was not required to make contributions that are not due.

C. USAC Improperly Reclassified KDDI Global and Locus Revenue from End-User to Reseller Status, but the Issue Is Not Currently Ripe for Review.

USAC affirms the Internal Audit Division's ("IAD") conclusion that KDDI Global and Locus incorrectly reported certain revenue as end-user revenue. Though the companies continue to dispute this finding, USAC's finding did not result in any additional contributions during the audit year, and KDDI Global and Locus have since changed their wholesale reporting

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31 USAC Appeal Decision at 9.

32 Locus has raised this concern in a separate proceeding before the FCC. Specifically, Locus seeks a declaratory ruling from the Commission to affirm carriers' rights to exclude private carriage revenues from their TRS (and other non-USF Title II Funding mechanism) contribution bases. *See* Locus Telecommunications, LLC, Petition for Declaratory Rulings Relative to the Treatment of Private Carriage Revenues, WC Docket No. 06-122 (filed Nov. 22, 2016).

33 47 C.F.R. § 54.702(c).

practices.[34] There is thus no live dispute on this issue, and the Bureau need not reach it. In the event the Bureau disagrees, Appellants briefly describe the dispute below.

On the Forms that IAD audited, KDDI Global and Locus reported substantial amounts of wholesale revenue as end-user revenue because neither company had the required "reasonable expectation" or "affirmative knowledge" necessary to report the revenue as carriers' carrier revenue..[35] IAD and USAC, however, concluded that KDDI Global and Locus "incorrectly" reported this revenue, taking the position that reporting revenue as end-user revenue is incorrect "even if a wholesale provider cannot demonstrate that it had a reasonable expectation that its customer would contribute" to the Fund.[36]

Though KDDI Global and Locus continue to dispute USAC's finding, the dispute is not currently ripe for review. As USAC has noted, reclassifying KDDI Global and Locus revenues from end-user to reseller status did not impact either company's contribution obligation, and, as a result, USAC concluded that the "[f]iler and its affiliates are not permitted to re-file their 2013 FCC Forms 499-A…."[37] Because USAC's decision did not result in additional liability during the audit year and KDDI Global and Locus have since changed their reporting practices, there is no reason for the Commission to reach this issue.

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[34] In response to the audit results, KDDI Global adopted carriers' carrier verification reporting procedures with the goal of meeting the reasonable expectation standard, including seeking annual resale certifications from its customers. Locus has discontinued the services at issue.

[35] *See Universal Service Contribution Methodology*, Order, 27 FCC Rcd. 13,780, 13,781-82 ¶ 3 (2012)

[36] USAC Appeal Decision at 4.

[37] KDDI Global Final Audit Report at 5; Locus Final Audit Report at 5.

If the Commission nevertheless determines that the issue is ripe for review, Appellants reiterate, and incorporate by reference as though fully set forth herein, the arguments they have presented to USAC in order to justify the revenues reported on their Forms 499-A.[38]

IV. CONCLUSION

For the foregoing reasons, the Bureau should reverse USAC's determination that Locus and Total Call's wholesale customers were its marketing agents. It should likewise reverse USAC's determination that Locus is a common carrier with respect to its wholesale sales of prepaid calling cards. Finally, the Bureau should direct USAC to permit carriers that offer services on both a private and a common carrier basis to report their private carriage revenue in a manner that does not subject the private carrier revenue to Title II fees that are not due on private carrier revenue.

Respectfully submitted,

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December 20, 2016

[38] *See* USAC Appeal at 2-6.

ATTACHMENT 1

Attachment Redacted In Its Entirety

ATTACHMENT 2

Attachment Redacted In Its Entirety

ATTACHMENT 3

Attachment Redacted In Its Entirety